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ATTORNEYS FOR APPELLEE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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No. 22A01-0610-PC-474

**April 18, 2008**

**MATHIAS, Judge**

Dennis Mikel (“Mikel”) was convicted in Floyd Circuit Court of six counts of Class A felony child molesting, one count of Class B felony vicarious sexual gratification, and one count of Class C felony child molesting. On direct appeal, we affirmed Mikel’s convictions. Mikel then filed a petition for post-conviction relief which the post-conviction court granted in part and denied in part. Both Mikel and the State appealed, and we reversed and remanded. Upon remand, the post-conviction court initially entered an order which granted some of Mikel’s requested relief. Mikel then filed a motion to correct error. The post-conviction court denied Mikel’s motion to correct error but did enter an amended post-conviction order. Mikel now appeals and presents two issues, which we restate as: (1) whether the post-conviction should have granted Mikel’s motion to correct error and vacated his convictions; and (2) whether the post-conviction court properly resentenced Mikel. We affirm.

### **Facts and Procedural History**

The facts underlying this case are particularly disturbing. In 1996, Mikel, who was thirty-nine years old, had a ten-year-old son and a nine-year-old stepdaughter. On several occasions, Mikel molested his nine-year-old stepdaughter. On another occasion, he fondled a seven-year-old neighbor girl. On yet another occasion, he made his son and stepdaughter engage in sex acts while he molested the neighbor girl. Mikel told the children that if they told anyone what had happened, he would kill them or bury them alive. On May 2, 1997, the State charged Mikel with Counts I through VI, Class A felony child molesting and Count VII, Class C felony child molesting. On July 2, 1997, the State added Count VIII, Class B felony vicarious sexual gratification. Following a

trial held on September 2-4, 1997, the jury found Mikel guilty as charged. At a hearing held on October 23, 1997, the trial court sentenced Mikel to a total of seventy years incarceration.<sup>1</sup>

Upon direct appeal, Mikel claimed that the trial court should have granted his pre-trial motion for severance of the charges. This court disagreed, and affirmed Mikel's convictions. See Mikel v. State, No. 22A01-9801-CR-22 (Ind. Ct. App. Aug. 14, 1998) ("Mikel I").

In 2000, Mikel filed a petition for post-conviction relief which he later amended in 2003. In his amended petition, Mikel claimed that the trial court had denied his right to a speedy trial, that the trial court had committed fundamental error in instructing the jury, and that both his trial and appellate counsel were ineffective. At the post-conviction hearing, Mikel established that the instructions given to the jury regarding Class A felony child molesting were based upon a version of the child molesting statute which did not go into effect until July 1, 1996. Under the former version of the child molesting statute, the offense was elevated to a Class A felony if it was committed by using or threatening to use of deadly force, or while armed with a deadly weapon, or if the offense resulted in serious bodily injury. See Ind. Code § 35-42-4-3 (1994). The amended version of the statute added an additional fact which elevated the offense to a Class A felony, i.e. if the offense was committed by a person at least twenty-one years of age. See Ind. Code § 35-

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<sup>1</sup> The trial court sentenced Mikel to thirty years on Count I, to be served concurrently with a five-year sentence imposed on Count VII. Upon Counts II–VI, the trial court imposed thirty-year sentences to be served concurrently with each other, but consecutive to the sentence in Count I. Lastly, the trial court imposed a ten-year sentence upon Count VIII, to be served consecutive to the other sentences.

42-4-3 (1996). Mikel's convictions were elevated to Class A felonies because of his age. However, the crimes with which Mikel was charged were committed in March, April, May, June, and July of 1996. Four of these months were prior to the effectiveness of the amended statute.

Mikel also established at the post-conviction hearing that the jury instruction on vicarious sexual gratification was for the Class C felony version of the offense, not the Class B felony version of the offense. Vicarious sexual gratification is elevated from a Class C to a Class B felony if the person directed to engage in sexual conduct is under the age of fourteen. In Mikel's case, the jury was instructed that it was required to find that his victim was under the age of sixteen, not fourteen.

On February 22, 2005, the post-conviction court entered an order reducing Mikel's six Class A felony child molesting convictions to Class B felony convictions, apparently on grounds of fundamental error.<sup>2</sup> Instead of ordering Mikel's conviction for vicarious sexual gratification be reduced to a Class C felony, the post-conviction court vacated the conviction entirely, again apparently on grounds of fundamental error. The post-conviction court then resentenced Mikel to forty-eight years of incarceration.

Mikel appealed, presenting the following five issues: (1) whether the post-conviction court erred in resentencing at a hearing without him being present; (2) whether the post-conviction court erred in increasing Mikel's sentence upon Count VII even though his post-conviction petition did not challenge Count VII; (3) whether the post-

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<sup>2</sup> The trial court's order did not find ineffective assistance of trial counsel or ineffective assistance of appellate counsel.

conviction court violated Mikel's Blakely rights in resentencing him; (4) whether the post-conviction court erred by not issuing specific findings of fact and conclusions of law addressing his claims of ineffective assistance of trial counsel; and (5) whether the post-conviction court erred by not issuing specific findings of fact and conclusions of law addressing his claims of ineffective assistance of appellate counsel. Notably, Mikel made no argument regarding the claim in his post-conviction petition that the trial court denied his right to a speedy trial. The State cross-appealed, arguing that the trial court erred in vacating Mikel's conviction for vicarious sexual gratification.

Upon this appeal, we agreed with the State that the post-conviction court erred in vacating Mikel's conviction for vicarious sexual gratification. Mikel v. State, No. 22A05-0504-PC-171 (Ind. Ct. App. Dec. 30, 2005) ("Mikel II"). Specifically, we held that the erroneous jury instruction was harmless because the age of the victim was not a contested issue—it was undisputed that he was ten when the crime occurred. Id., slip op. at 12. With regard to the child molesting convictions, we held that, to the extent the post-conviction court concluded that the trial court had committed fundamental error, this was improper as the fundamental error doctrine is unavailable upon post-conviction review. See id. at 8 (citing Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002)). We also concluded that if the post-conviction court intended to grant relief on grounds of ineffectiveness of counsel, it should have entered specific findings of fact and conclusions of law to enable appellate review. Id. at 10. We therefore remanded with

instructions that the post-conviction court enter specific findings and conclusions pursuant to Post-Conviction Rule 1(6).<sup>3</sup> Id.

Upon remand, the post-conviction court entered findings of fact and conclusions of law on June 15, 2006, wherein it concluded that “Mikel had carried his burden on all issues except a[s] to Count VIII [vicarious sexual gratification],” and that “[t]he law is with . . . Mikel and against the State[.]” Appellant’s App. p. 164. The post-conviction court again found that the jury instructions regarding Class A felony child molesting constituted fundamental error, that Mikel’s right to a speedy trial had been violated, that Mikel had received the ineffective assistance of trial and appellate counsel, and that Mikel had been subject to prosecutorial misconduct. The court then reduced Mikel’s Class A child molesting convictions to Class B felony convictions, reinstated Mikel’s conviction for vicarious sexual gratification pursuant to the opinion of this court in Mikel II, and ordered a new sentencing hearing.

Apparently unsatisfied with this conclusion, Mikel filed a motion to correct error on July 17, 2006. Mikel complained that the post-conviction court’s finding of ineffective assistance of trial and appellate counsel was based in part on the conclusion that Mikel’s right to a speedy trial were violated. Mikel argued that the proper remedy for such would be to discharge him and dismiss the charges against him. On July 28, 2006, the post-conviction court entered an order denying Mikel’s motion to correct error but also amending its findings of fact and conclusions of law. In its amended findings and conclusions, the post-conviction court removed any reference to Mikel’s right to a

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<sup>3</sup> We also concluded that Mikel could not present a Blakely claim upon post-conviction review. Id. at 13.

speedy trial having been violated, but otherwise ordered the same relief as its first order. On September 7, 2006, the court held a hearing to resentence Mikel. At the conclusion of this hearing, the court again resentedenced Mike, this time to a total of fifty years incarceration.<sup>4</sup> Mikel now appeals.

### **I. Denial of Motion to Correct Error**

Upon appeal, Mikel first claims that the post-conviction court lacked the authority to resentence him because it had determined that his right to a speedy trial had been violated.<sup>5</sup> Mikel is correct that the remedy for a violation of a defendant's right to a speedy trial is discharge of the defendant. See State v. McGuire, 754 N.E.2d 639, 642 (Ind. Ct. App. 2001), trans. denied; Ind. Crim. Rule 4(C). Mikel, however, overlooks the fact that the post-conviction court, in its amended findings of fact and conclusions of law, specifically removed any reference to violation of Mikel's right to a speedy trial. Thus, the post-conviction court did not find that Mikel's right to a speedy trial was violated.

To the extent that Mikel's argument can be construed as arguing that the post-conviction court should have concluded that his right to a speedy trial was violated, we

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<sup>4</sup> Specifically, the post-conviction court resentedenced Mikel as follows: Count I, twenty years; Counts II–VI, twenty years concurrent, but consecutive to Count I; Count VII, five years concurrent with Count I; and Count VIII, ten years, consecutive to Count I, but concurrent with Counts II–V, for a total of fifty years.

<sup>5</sup> To the extent that the post-conviction court again relied upon fundamental error to conclude that the jury had been improperly instructed or that Mikel had been subject to prosecutorial misconduct, it was improper to do so. As we noted in Mikel II, the fundamental error doctrine is not applicable in post-conviction proceedings. See Mikel II, slip op. at 8 (citing Sanders, 765 N.E.2d at 592). However, the post-conviction court also found that Mikel had received the ineffective assistance of counsel with regard to the jury instructions on child molesting as a Class A felony. The State makes no argument upon appeal that the post-conviction court erred in doing so and reducing Mikel's Class A felony convictions to Class B felony convictions upon this ground.

are unable to agree. For several reasons, we conclude that Mikel has not properly preserved this issue for appeal.

Initially, no speedy trial issue was presented in Mikel's direct appeal. "If an issue was known and available, but not raised on direct appeal, it is waived." Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001). Further, although Mikel did claim in his post-conviction petition that his appellate counsel was ineffective for failing to raise the speedy trial issue upon direct appeal, the post-conviction court's initial ruling on Mikel's petition did not find a violation of Mikel's right to a speedy trial. Despite this, Mikel did not challenge this aspect of the post-conviction court's ruling in his first post conviction appeal. See Appellee's App. pp. 6-27. Having chosen not to present this issue in his first post-conviction appeal, Mikel cannot now present this issue for the first time in an appeal following remand.<sup>6</sup>

Moreover, in his current appeal, Mike does not couch his speedy trial claim in terms of ineffective assistance of counsel. He instead claims that he "has not waived his rights to have the charges against him in the case dismissed as it would be fundamental error to allow this to occur." Appellant's Br. p. 8. As stated earlier, our supreme court has held that the fundamental error doctrine is unavailable in post-conviction proceedings. Sanders, 765 N.E.2d at 592. For all of these reasons, the post-conviction

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<sup>6</sup> We also note that when Mikel's trial counsel was presented with new evidence by the State shortly before trial, he sought a continuance. The State objected to the continuance unless Mikel agreed to waive his request for a speedy trial. Mikel's trial counsel agreed to waiver, and the trial court specifically asked Mikel if he personally agreed with the decision of his trial counsel. Mikel responded, "Yes." Trial Record p. 739. The trial court then rescheduled the trial to take place in four weeks, explaining, "this is with the understanding that the Defendant is relinquishing his right to speedy trial, although we're setting it as quickly as we can . . . with [Mikel's] attorney's ability to get prepared." Id. at 740. Thus, it appears that Mikel personally acquiesced in the decision to waive his right to a speedy trial.



court did not err by failing to conclude that Mikel's right to a speedy trial had been violated. Therefore, the post-conviction court had the authority to resentence Mikel.

## **II. Resentencing**

Mikel also claims that even if the post-conviction court did have the authority to resentence him, it erred in imposing the sentence it did. Mikel first claims that the post-conviction court failed to find any aggravating circumstances justifying his enhanced, consecutive sentences. He is mistaken.

In its September 7, 2007 re-sentencing order, the post-conviction court specifically adopted the findings of the original sentencing court. That court found several aggravating factors, including: Mikel's prior criminal convictions involving alcohol and substance abuse; the risk that Mikel would re-offend given his substance-abuse problem; the nature and circumstances of the crime, particularly the threats of violence Mikel made against his young victims and the impact that these threats had on them; the young age of the children, all of whom were under twelve years of age; and that imposition of a lesser sentence would depreciate the seriousness of the crime.<sup>7</sup> The original sentencing court appeared to find a relatively insignificant mitigating factor—that Mikel's crimes seemed to be fueled by his alcohol and substance-abuse problem. We find no error in the post-conviction court's adoption of the aggravating factors found by the initial sentencing court as opposed to the post-conviction court listing its own identical factors.

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<sup>7</sup> We recognize that if the trial court is not considering imposing a reduced sentence, it is improper for the court to consider as aggravating, that imposition of a reduced sentence would depreciate the seriousness of the crime. Roney v. State, 872 N.E.2d 192, 200 n.3 (Ind. Ct. App. 2007), trans. denied. Even though Mikel does not challenge this aggravator as improper, if he did, we would conclude the remaining aggravators support the trial court's sentencing decision.

Mikel also claims that the post-conviction court, having found no additional aggravators than did the original sentencing court, should have imposed the presumptive sentences on all of his convictions, as did the original sentencing court. Mikel, however, fails to support this argument with any citation to authority. We therefore conclude that Mikel has waived this argument.<sup>8</sup> See Ind. Appellate Rule 46(A)(8)(a).

### **Conclusion**

The post-conviction court did not err when it amended its findings and conclusions to remove any reference to Mikel's speedy trial rights having been violated. Lastly, Mikel has not established any error in the post-conviction court's re-sentencing him to a total of fifty years incarceration.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.

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<sup>8</sup> Waiver notwithstanding, we do note that Indiana Post-Conviction Rule 1(10)(b) provides:

If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

Here, however, the post-conviction court did not impose a more severe penalty than originally imposed. Mikel was originally sentenced to seventy years; upon remand, he was sentenced to fifty years.